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CAN Y BE CONSTITUTIONALLY TAXED TO PROVIDE A FARM FOR X?

Against the tide of socialistic or quasi-socialistic legislation, being proposed by the legislatures of many states, the courts are setting up no serious obstacles. They are construing state and federal constitutions with a liberality that would have astounded the fathers.

For this observation we find an interesting illustration in the recent case of State v. Clausen, 188 Pac. 538, in which the State Reclamation Act of the State of Washington was held to be constitutional. This act created a Reclamation Board with authority to select public lands and to purchase undeveloped private lands believed to be available for settlement; to subdivide such lands into smaller tracts suitable for farms; to improve such farms with houses, barns and other accessories to a good farm; to sell and lease such farms on reasonable terms to desirable tenants, showing preference to soldiers; to extend credit on such purchases for a period not to exceed forty years; and to provide free instruction for settlers so as to render them better qualified for the cultivation of their lands. To test the validity of the tax levied for this purpose a friendly suit was instituted by the Board against the auditor to compel him to issue warrants in their favor against the fund so created.

It is elementary law that a tax may be levied and collected only where the fund so created is expended for a public purpose. A tax which *directly* bestows a purely private benefit upon some individual is clearly outside the powers of any legislature to levy. This principle is fundamental; unless it is strictly observed, the strongest social organization will fall apart. If the state can tax A to enrich B then it is possible for any majority — or even a plurality — to tax the minority—or even a majority to enrich those specially favored by the party in power.

We are aware of the difficulty of setting up a test to determine what is a public use; we are familiar with the fantastical argument of Justice Ladd in the celebrated case of Perry v. Keene, 56 N. H. 514, who claimed that the Court's idea of a public use was no better than that of the legislature; we appreciate Dean Roscoe Pound's argument that judges must keep step with social conditions and adapt the law to the new demands and necessities of the people; but taking into account all of these elements we do not believe that a court has a right to shirk its duty to investigate carefully the purpose for which any fund created by taxation is to be used and, if found to be for a private purpose, fearlessly to use its power to protect those whose property is being taken away and given to others.

Because it is so difficult to determine what is a public use the danger is very great that gradually we will be led to give up those choice guarantees which are ours under the Constitution and which now so effectually protect us in the enjoyment of the things we call our own. There must therefore be set up somewhere a limit beyond which a legislature may not go in arbitrarily defining a public use. That limit, it is true, will not be the same in every age. The automobile for instance, has made necessary great state and national highways which in the day of horse traffic were not necessary. Congregation of large masses of people in large cities has resulted in a sharp curtailment of constitutional rights of private property in favor of the common welfare and the people have been properly taxed to remove garbage, to provide a water supply, and to do many things which, because of the great congestion and dependence of the people on each other, cannot be done by each individually, but can

only be done by the municipality acting for all. But while this is true, nevertheless there is bound to be some limitation to the taking of private property for a public use whether by eminent domain or the more insidious mode of taxation, and that limit to our mind is whether the use is one by which the great majority of the people will be directly benefited and one which under present social conditions cannot be adequately supplied by private enterprise.

The above test is our own and we like it better than the one given by many text writers, to-wit, the custom of the community. In Gray, Limitations of the Taxing Power, Sec. 176, the author states that the limit should be the "customs of the government and the community." The Washington Supreme Court very properly objects to this standard because it "is wholly out of harmony with the thought permeating all of the later decisions, that new conditions and new public necessities are weighty considerations in determining the question of public purpose; for, if custom is to be the controlling factor in deciding the question, then the consideration of new conditions and new necessities are of little moment in deciding the question."

Our objection to the decision of the Washington Supreme Court in the Clausen case, however, is that it has no test whatever of a public use and seems to be wandering in the dark with not even a ray of light to guide its future course. So far as that Court is concerned the legislature can go as far as it likes and tax the people for any purpose which it arbitrarily labels a public use. Such a weak position on the part of a Court whose supreme duty it is to uphold and protect the Constitutional rights of the people even as against the will of the majority offers no obstacle to the increasing boldness of those who profess no regard for our Constitutions and whose sole purpose in legislation seems to be to take from those who have and give to those who have not. In the Clausen case the Supreme Court of Washington thus justifies the Reclamation Act:

"Is there not abundant room for arguing that the development of our unoccupied lands suitable for agriculture, by a land policy which would encourage the settlement thereon of home-owning farmers, will materially contribute to the welfare of our people as a whole Can it not be argued with a fair show of reason that, not only will such a policy ultimately lead to the enhancement of the material wealth of the state, but that it will also make for better citizenship, better notions of necessity for law and order, and a sounder and saner patriotism? In the light of the debatable character of these questions, we are quite convinced that it is not within the province of the judicial branch of our state government to answer them in the negative."

The Reclamation Act of Washington does not, by reason of its objectives come within the category of laws regulating public utilities—those institutions or lines of business in which the public have a direct interest, such as schools, highways, mills, grain elevators, railroads, hotels, telegraphs, telephones, electric light and power, water rights and power, and many other lines of business which are declared to be affected with a public interest. In this case the parties to be directly benefited are those who buy improved farms from the state. Under this scheme A is to be taxed so that B can have the opportunity to buy a good farm on easy terms. Applying our double test let us inquire first, are the people directly benefited by this use of the fund or only a few individuals; second, could the purpose of this Act be achieved by private enterprise? It does not seem to us that this Act benefits the whole people except in a very remote way. Second, it seems to be wholly unnecessary for the public to go into the real estate and mortgage business in order to start off a few young farmers in the style proposed by this Act. Private enterprise is amply able to furnish any man with a good farm and with

money enough to improve it, and when a man by his own initiative has thus achieved success he will not have to hold his head down and admit that he has been a ward of the government. Moreover, if the state can stake a young farmer to a farm, why not stake a young manufacturer to a new factory? Why not create a fund to drill oil lands for oil speculators? North Dakota levies a tax to buy seed for the farmers. Why not levy a tax to buy law books for young lawyers. They need them about as badly as a farmer needs seed and if they had them, their clients and indirectly the public might suffer less from their bungling methods.

It would be well for our courts to pay greater heed to the sound decision and clear argument of the Massachusetts Court in Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39, which declared unconstitutional an act to raise by taxation a fund of $20,000,000 to loan to those whose homes had been destroyed by fire. The Court said:

"The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion."

Somewhere there must be a limit to the power to tax; some sort of definition must be made of a "public use" for which taxes may be raised; otherwise the mad rush to cure all the ills of man by law and by funds raised by the taxation will not cease until the whole fabric of our civilization breaks down under a load it should never have been called upon to bear. Moreover every such act as this that makes the people dependent on the state for support serves to undermine the strength and initiative of the American character and encourages men to rely more upon the state than upon their own resources.

NOTES OF IMPORTANT DECISIONS.

APPROPRIATING MONEY GIVEN FOR A SPECIAL PURPOSE IS LARCENY.—The distinction between larceny and false pretense, which is sometimes very difficult to make, is discussed by the Court of Appeals of California in the recent case of People v. Shwartz, 185 Pac. 686.

In this case the defendant accepted $100 from each of several prosecuting witnesses who were engaged in the business of conducting bath and massage parlors in the city of Los Angeles, for the conduct of which they were required to have a license. Defendant stated that he could fix the police commissioners and secure their license for the amount that was paid. The money was never paid to the police commissioners nor to any one else, but was appropriated by the defendant for his own use. Defendant contended that if he was guilty of any crime it was obtaining money under false pretense. The Court, however, held that he was guilty of grand larceny, and in explanation of the distinction existing between these two classes of offenses, said:

"It is claimed by appellant that if the evidence shows him to be guilty of any crime it is that of obtaining money by false pretenses, and not grand larceny—the crime of which he was convicted. In support of this claim it is contended that the evidence shows indubitably that each of the complaining witnesses intended to part with the title to her money as well as its possession. The distinction between larceny and false pretense is substantially this: In larceny the owner of a thing has no intention to part with his property therein to the person taking it, although he may intend to part with possession. In false pretense the owner does intend to part with his property in the money or chattel, but it is obtained from

him by fraud (People, etc., v. Delbos, 146 Cal. 734, 81 Pac. 131). There would be merit in appellant's contention if, when the complaining witnesses delivered the several sums to him, they had intended that the moneys should then and there become his property. So far from such being the case, it appears from the evidence that each complaining witness, at the time when she delivered her money to appellant, intended that it should be received by him for the purpose of carrying it and paying it to some person, unknown to the witness, whom, however, she supposed to be an actually existing person, but who, as a matter of fact, was a spurious and mythical individual, invented by appellant for the fraudulent purpose of tricking the witness into parting with the possession of her money.

APPLICABILITY OF THE INTERSTATE COMMERCE ACT TO TELEGRAPH COMPANIES.*

The exercise by the Federal congress in recent years of its powers to define the rights and regulate the conduct of our people has attracted considerable attention. This legislation is so extensive and has such distinctive features that we might say that we have entered upon a new era in the development of our Federal law. One of the most important branches of Federal legislation in recent years, I think, is the exercise of the power of Congress in the regulation of interstate commerce. The original Interstate Commerce Act and its several amendments, the Employers Liability Act, the Food and Drugs Act, the Meat Inspection Act, the Hours of Service Act, the Clayton Act and the Trade Commission Act, the White Slave Act and the Shirley Amendment to the Food and Drugs Act, in the nature of police regulations, show the activity of Congress with reference to this kind of legislation. The Supreme Court of the United States held in the Primrose Case[1] that telegraph companies were not common carriers, but by the Amendment of June 18, 1910, telegraph, telephone and cable companies (wire and wireless) were brought under the Commerce Act, and therein defined to be "common carriers." The fact that some of the sections of the Commerce Act were amended and others were left as they were before, created some uncertainty as to the extent to which the provisions of the Act applied to such companies. The companies contend that by the amendment Congress has manifested an intention to take possession of this field of legislation, and has thereby removed such companies, in the matter of interstate commerce, from the control of state decisions and state statutes, and that the damages recoverable against them must be measured by common law principles as declared by the Supreme Court of the United States and enforced in the Federal Courts, and that state statutes and decisions applying a different rule are inapplicable.

Beginning with the case of So Relle vs. W. U. T. Co.,[2] decided in 1881, there has grown up what is called the "mental pain and anguish doctrine," which is contrary to the principles declared by the Federal Courts. Subsequently the Courts of Alabama, and several other states, adopted a like rule, while it was rejected by the Federal Courts and those of many of the states.[3]

In the first case declaring the mental pain and anguish doctrine,[4] the Court recognized one of the dangers of the doctrine and said: "It should be remarked that great caution ought to be observed in the trial of causes like this, as it will be so easy and natural to confound the corroding grief occa-

*A paper read by Mr. W. M. Williams at the 1916 annual meeting of the Alabama State Bar Association.

(1) 154 U. S. 1.

(2) 55 Tex. 308.

(3) Many of the cases are reviewed in W. U. T. Co. vs. Choteau (1911), 28 Okla. 604, Am. Cas. 1912 D, 824, 49 L. R. A. (N. S.) 206 and note; So. Exp. Co. vs. Byers (Adv. Op. U. S. p. 410); the general subject is discussed and the authorities Sherman & Redfield on Negligence, 6th ed. Sec. Sedgwick on Damages, 9th ed. Sec. 43, et seq. and cited in Sutherland on Damages, 3d Ed. Sec. 975; 756, et seq.

(4) So Relle vs. W. U. T. Co. supra.

sioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company; for it is only the latter for which a recovery may be had."

In some of the states, especially where the Courts had rejected the doctrine, the legislatures enacted statutes which practically made telegraph companies insurers and held them liable for special and uncontemplated damages. Some of the states imposed penalties for mere errors or delays in transmission or delivery, which penalties varied in amount according to the personnel and whims of the various legislatures. In Missouri the penalty was three hundred dollars for "every neglect" to be recovered by the person sending the message, two-thirds of the amount recovered to be retained by the plaintiff and one-third to be paid into the county school fund, though the school, of course, was not damaged,[5] and in some instances the employes of the company as well as the company were made subject to the penalty. In Mississippi the penalty was twenty-five dollars in addition to damages;[6] in Virginia, one hundred dollars;[7] in Georgia, twenty-five dollars, in addition to damages;[8] and so on. In Virginia the penalty was recovered from the Postal Telegraph Company where the delayed delivery of the telegram resulted in profit to the plaintiff.

In addition to the dangerous mental pain and anguish doctrine in force in some of the jurisdictions, in some of the states the stipulations on the back of the printed telegraph and cable blanks classifying the messages and limiting liability, were nullified by the decisions and statutes.

If the Commerce Act does not apply to telegraph companies, in the manner contended for by them, then the rule for measuring the liability for an interstate message is either that of the general common law, as declared by the United States Supreme Court,[9] or the supposed public policy of a particular state, or the statute law of a parparticular state.[10] It is therefore seen how important it is from the standpoint of the companies that there should be some uniform rule for the measure of damages and the regulation of such companies; and the public is also interested in uniform rules and regulations and non-discriminating and reasonable rates.

The applicability of the Act to telegraph companies is of the most imporant interest to the government, because under the Act of Congress adopted July 24, 1866, and entitled "An Act to aid in the Construction of Telegraph Lines and to secure to the Government of the United States the use of the same for Postal, Military and other Purposes,"[11] telegraph companies accepting the provisions of the Act are governmental agencies and a part of its postal system.[12] The purpose of the Act was to secure to the government preferential and economical use of the lines of telegraph companies, and the right to purchase and own the companies, pursuant to the terms of the Act.[13]

The original Commerce Act known as the "Regan Act," adopted February 4, 1877, was limited in its operation, and included within its provisions only "common carriers engaged in the transportation of passengers and property wholly by railroad or partly by railroad and partly by water, when both are used." It has been variously amend-

(5) Rev. Sts. Missouri, 1909, p. 1200.
(6) Miss. Code, 1906, Sec. 4879a.
(7) Va. Code, 1904, Sec. 1294 h.
(8) Ga. Code, 1911, Sec. 2812.

(9) Primrose v. Western Union Tel. Co., 154 U. S. 1; Hart v. Pennsylvania R. Co., 112 U. S. 331.

(10) Western Union Tel. Co. vs. Commercial M. Co., 218 U. S. 406; Western Union Tel. Co. v. James, 162 U. S. 650; Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477; Chicago M. & St. P. R. Co. v. Sloan, 169 U. S. 133; Adams Exp. Co. v. Croninger, 226 U. S. 491.

(11) Act of July 24, 1866, ch. 230; 14 Stat. L. 221.

(12) W. U. T. Co. vs. Texas, 105 U. S. 460; Williams v. Talladega, supra.

(13) W. U. T. Co. v. Texas, supra.

ed and supplemented.[14] However, no substantial change was made in the Interstate Commerce Act until 1906, when congress passed the Hepburn Act and the Carmack Amendment which very materially enlarged the field covered by the Act, and included within the provisions thereof, in addition to common carriers by railroad and water, sleeping car companies, express companies, iron and pipe lines and bridges and ferries—all of which were declared to be common carriers and subject to all the provisions of the Act. Enlarged powers were conferred on the Interstate Commerce Commission and express regulation of all contracts of the companies subject to the Act were provided for by the Carmack Amendment. I refer to the several Acts of Congress for the purpose of showing the gradual development and extension of the field covered by the Federal law. It was not until June 18, 1910, that congress mentioned telegraph, telephone and cable companies in this legislation. By the amendment of June 18, 1910,[15] Section 1 of the original act was amended to read as follows:

"Section 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone and cable companies (whether wire or wireless), engaged in sending messages from one state, territory, or district of the United States, to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or freight wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States or the District of Columbia, to any other state or territory in the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any other state or territory as aforesaid, nor shall they apply to the transmission of message by telephone, telegraph or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid.[15a]

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by telegraph, tele-

(14) Act of Feb. 4, 1887, Ch. 104, 24 Statutes at Large, 379; Act of March 2, 1889, Ch. 382, 25 Statutes at Large, 855; Act of Feb. 10, 1891, Ch. 128, 26 Statutes at Large, 743; Act of Feb. 11, 1893, Ch. 83, 27 Statutes at Large, 443; Act of Feb. 19, 1903, Ch. 108, 32 Statutes at Large, 847 (The Elkins Act; Interstate Commerce Act of 1903); Act of Feb. 25, 1903, Ch. 755, 32 Statutes at Large, 904; Act of June 29, 1906, 34 Statutes at Large, 584 (The Hepburn Act); Act of April 13, 1908, Ch. 143, 35 Statutes at Large, 60; Act of Feb. 25, 1909, Ch. 193, 35 Statutes at Large, 648; Act of June 18, 1910, Ch. 309, 36 Statutes at Large, 539; Act of Aug. 24, 1912, Sec. 11, 37 Statutes at Large, 566 (The Panama Canal Act); Act of Oct. 22, 1913, Ch. 32, 38 Statutes at Large, 219, 221. See excellent articles by Mr. Karl W. Kirchwey in 14 Col. L. Rev. 211, and Mr. Wm. Overton Harris in Vol. II, No. 2 Virginia L. Rev. 98.

(15) Ch. 309, 36 Statutes at Large p. 539.

(15a) 36 Stat. L. 544.

phone or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of service."[15b]

Section 3 prevents discrimination; Section 10 provides for a penalty and punishment for violation of the Act; Section 12 confers on the Commission the right to inquire into the management of the business of all common carriers subject to the provisions of the Act; it gives to the Commission full power to define just and reasonable rates and to determine upon whether or not the rules and regulations are discriminatory, unjust or prejudicial, or otherwise in violation of the provisions of the Act. Section 20 empowers the Commission to require annual reports from all common carriers subject to the Act, and provides for uniform accounts; it gives the Commission the power and right to inspect and examine all the records of common carriers, and confers on the Circuit and District Courts of the United States jurisdiction to issue writs of mandamus commanding common carriers to comply with the provisions of the Act.

Soon after the adoption of the Act the Commission ruled[16] that Paragraph 5 of Section 15 giving the shipper the right to select the route for shipments by carrier did not apply to telegraph companies, and later the Commission ruled that Section 1, providing that charges shall be just and reasonable, and Section 3, forbidding discrimination, Section 15, defining the procedure for enforcing the law, and Section 20, requiring annual reports and giving the Commission authority to compel the carriers to give such information as desired, were all applicable.[17] In December, 1911, the Commission ruled that Section 6, requiring that carriers of property shall file their tariffs and that such filing shall precede the transportation, does not apply to telegraph companies.[18] In 1913 the Commission approved a printed form of instructions for a uniform system of accounts to be tabulated by telegraph and cable companies, exclusive of wireless companies, in accordance with Section 20 of the Act.

The Supreme Court of the United States has said that congress has supreme power over the regulation of interstate communication by telegraph,[19] but it has not yet spoken with reference to the effect of the amendment as to telegraphic communication, and in considering what the result will be in that Court we can only be guided by the principles already announced by it. The contentions of the companies have recently been upheld by the United States Circuit Court of Appeals.[20]

The adjudications of the Supreme Court with reference to the power of the state over the general subject of commerce are divided into three classes: (1) those in which the power of the state is exclusive; (2) those in which the state may act in the absence of legislation by congress; (3) those in which the action of Congress is exclusive.[21] The elementary and long established doctrine is that there can be no divided authority over interstate commerce,

(15b) 36 Stat. L. 545.
(16) Conference Ruling, 291.
(17) Cof. Rul. 305.
(18) 25 Annual Report.
(19) Western Union Tel. Co. vs. Pendleton, 122 U. S. 347.
(20) Gardner v. W. U. T. Co., Fifth Circuit, MSS. and several State Courts, W. U. T. Co. v. Berryville, 83 S. E. (Va.) 424; W. U. T. Co. v. Bilisoly, 82 S. E. (Va.) 91; Boyce v. W. U. T. Co. Va. Ct. of App., MSS; W. U. T. Co. v. Compton, 169 S. W. (Ark.) 946; W. U. T. Co. v. Sharp, 180 S. W. 504; W. U. T. Co. v. Stewart, 179 S. W. (Ark.) 813; W. U. T. Co. vs. Johnson, 171 S. W. (Ark.) 859; Haskeu v. Postal T. Co. 96 Atl. (Me.) 219; W. U. T. Co. vs. Dant. Ct. Appeals Dist. of Columbia, MSS.
(21) Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204.

and that the regulations of congress over that subject are supreme. It results, therefore, that where from the particular nature of certain subjects the state may exert authority until congress acts under the assumption that congress, by inaction, has tacitly authorized it to do so, action by congress destroys the possibility of such assumption, since the action, when exerted, covers the whole field and renders the state impotent to deal with a subject over which it had no inherent but only permissive power.[22]

In Northern Pacific Ry. Co. vs. Washington,[23] it was held that the Act of Congress regulating the hours of service for employees rendered void certain state laws on that subject, although the Federal law had not gone into effect; and in Erie Railroad vs. New York,[24] it was decided that a state law regulating the hours of service of railroad, telegraph and telephone operators engaged in interstate business was void, because the Service Act had completely covered the field. In Mondou vs. N. Y., N. H. & H. R. Co.,[25] it was held that state regulations had been superseded by the Employers Liability Act; and in St. Louis & Iron Mt. Ry. vs. Edwards,[26] it was decided that under the Commerce Act a state law providing a penalty for a delayed shipment was void. In Southern Railway vs. Reid,[27] it was held that under the Hepburn Act, a statute imposing a penalty with reference to freight shipments was void; and in the Hooker Case,[28] it was held that congress had acted with reference to interstate commerce and that varying state policy could not control.

(22) Chicago R. I. & P. Ry. v. Hardwick, 226 U. S. 435; Manchester v. Massachusetts, 139 U. S. 262; N. Y. C. Ry. Co. v. Hudson County, 227 U. S. 248; So. Ry. v. Reid, 56 U. S. 443, T. & P. Ry. Co. v. Abilene Cotton Oil Co. 204 U. S. 439.

(23) 222 U. S. 370.

(24) 233 U. S. 675.

(25) 223 U. S. 1.

(26) 227 U. S. 265.

(27) 222 U. S. 370.

(28) 233 U. S. 97.

The "Carmack Amendment," which was extended to telegraph and telephone companies by the amendment of June 18, 1910, specifically defines the carrier's liability or obligation under interstate contracts of shipment. By the Carmack Amendment the Act was perfected and completed as to common carriers as then defined by the Act. In Adams Express Co. vs. Croninger,[29] the Court, referring to the Act as amended by the Carmack Amendment, said: "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt that congress intended to take possession of the subject and supersede all state regulations with reference to it. Only the silence of congress authorized the exercise of the police power of the state upon the subject of such contracts." In the Carl Case,[30] the Court said: "That amendment undoubtedly manifested the purpose of congress to bring contracts for interstate shipments under one uniform rule of law, and therefore withdraw them from the influence of state regulation." It had been previously said by the Supreme Court that "the telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself.[31]

In the Croninger Case, the Express Company set up as a defense to the action to recover the value of an express package, a stipulation in the express receipt or bill of lading limiting its liability to fifty dollars.

(29) 226 U. S. 491.

(30) 227 U. S.

(31) W. U. T. Co. v. Texas, 105 U. S. 460.

This stipulation is similar to one of the telegraph stipulations found printed on the blanks. Under the law of Kentucky this stipulation was void. The Court declaring that congress had covered the field, held that while a common carrier cannot exempt itself from its own negligence it may by reasonable agreement with the shipper limit its liability commensurate with the charges, on the principle that "the charge should bear some reasonable relation to the responsibility."[32]

In all fairness to telegraph and cable companies, defined as common carriers under the law and subject to the penalites imposed by the Act, they should be entitled to a larger compensation in transmitting a message involving a liability of several thousands dollars for an error than they should receive when only nominal damages would result. Mr. Justice Lurton in the Croninger Case, says: "To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy, will either make the provisions less than supreme or indicate that congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities which led to the amendment." On April 13, 1916, the Supreme Court in So. Exp. Co. vs. Byers,[33] referring to the Commerce Act, held that damages for mental suffering only are not recoverable from a carrier on account of its delay in the delivery of an interstate shipment, and said: "Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon Acts of Congress, the bill of lading and common law principles accepted and enforced by the Federal Courts."

(32) See also Kansas City S. R. Co. v. Carl, 227 U. S. 639; M. K. & T. Ry. v. Harriman, 227 U. S. 657.

(33) Adv. Op. 11, p. 410.

The applicability to the present question of the principle declared in the cases last mentioned might be questioned on the heory that Section 20 of the Carmack Amendment, which was under consideration in the Croninger Case, requires that the common carrier shall issue a receipt or bill of lading for the property to be transported, and that therefore the Carmack Amendment concerns only carriers transporting physical property. The amendment of 1910, however, makes no such distinction. It distinctly defines "telegraph, telephone and cable companies (whether wire or wireless)" "to be common carriers within the meaning and purpose of this Act." The Act, as amended, is too broad in its comprehension to be given so limited a construction. It was not necessary that congress should require such companies to issue a receipt; they do not take into their possession physical property for which they have to account either by delivery to the consignee or to a connecting carrier. In fact, we do not see how such a requirement would be practicable. And furthermore, the telegraph blank showing the message and the contract remains in the telegraph office, and that part of the Carmack Amendment requiring that a receipt or bill of lading be issued, immediately after that recital provides that "no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability here imposed." This seems to indicate that congress had in mind the contracts, rules and regulations of common carriers who in the conduct of their business did not issue receipts or bills of lading; and we think it is unreasonable to assume that congress would make provision for the protection of the shippers of freight and not provide a similar protection for those using the services of wire companies.

In this connection, it is significant that the amendment specifically authorizes the companies to classify messages into "day, night, repeated, unrepeated, letter, com-

mercial, press, Government, and such other classes as are just and reasonable," and also different rates to be charged for the different classes of messages. The classes specially mentioned are those classes which had been used by the companies for many years and were used as shown by the printed stipulations on the back of the printed blanks at the time the amendment was adopted. Congress was evidently familiar with those classifications and they no doubt assumed that these stipulations were known to the Commission. These classifications having been established by the companies, in the manner intended by congress, it seems that they should become a part of the contract for transmission even though the message is not written on one of the blanks containing those stipulations. These classifications are not made by agreement between the sender and the company, but exist by virtue of their establishment by the company in accordance with the Commerce Act. The classifications having been established and entering into the rate itself, should be none the less binding on the sender because the message is not written on the usual blank. Such written contract could not enlarge or limit the liability fixed by the classification so established.[34] Under this view a receipt or bill of lading would be not only impracticable but useless.

But it may be contended that the classifications, regulations and tariffs are to be established as contemplated by the Act, by filing them with the Commission, and that unless they are so filed, they are not within the control of the Commission and would not be binding even if the sender signed the usual blank. While the Act does not require wire companies to file with the Commission rules and tariffs, we believe that the provisions of the Act answer the argument in that the Act in failing to provide that the rules, regulations and tariffs shall be such as are first approved by the Commission, the companies may establish the classifications and rates which will be prima facie reasonable until otherwise declared by the Commission. Such seems to be the meaning of that part of the Act authorizing the classification and the fixing of rates. The Commission has the power, on its own initiative, or on the complaint of any person, to inquire into the reasonableness and validity of these classifications, regulations and rates. Recently the standard rates of the Western Union Telegraph Company for the transmission of messages from New York to San Francisco and by cable from New York to points in England were under consideration by the Commission in White & Co. vs. Western Union.[35] The Commission said: "It is plain that both classification and charge are to be made in the first instance by the carrier, and it follows by necessary implication that the carrier is to define the classes and formulate such rules and regulations pertaining thereto as shall be just and reasonable. The initiative is with the carrier. Jurisdiction over these cable rates is clearly conferred upon us by the Act to regulate commerce. * * * Such charges are prima facie reasonable, except where otherwise provided by law. And the Federal District Court,[36] has held that the reasonableness of the telegraph stipulation classifying messages and fixing different rates therefor cannot be raised in a court of law until it has first been raised before the Commission."

Prior to the Amendment of 1910, telegraph companies had sought protection under the Constitution against the penalty statutes and those laws prohibiting a contractual limitation of liability. In the Pendleton Case,[37] a statute imposing a penalty for failure to deliver messages was held

(34) Boston & Maine R. R. v. Hooker, 233 U. S. 97; A. T. & S. F. R. R. Co. vs. Robinson, 233 U. S. 173, but see W. U. T. Co. v. Favish, 71 So. 183.

(35) 331 I. C. C. 500.
(36) Williams v. W. U. T. Co., 203 Fed. 140.
(37) 122 U. S. 347.

invalid as an impediment to the freedom of interstate commerce, and that it was beyond the police power of the state of Indiana to "regulate the delivery of such dispatches at places situated in other states." But later the Supreme Court distinguished the principle of the Pendleton Case, and in the James,[38] the Commercial Milling Co.,[39] and the Crovo[40] cases, upheld state statutes which did not attempt to regulate or control the telegraph companies outside of the respective states where the laws were enacted, as the rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits, so long as congress has not legislated on the subject. Recently the Supreme Court of the United States, in Brown vs. W. U. Tel. Co.,[41] without reference to the "Telegraph Amendment," has held that mental pain and anguish is not recoverable under the South Carolina statute on the theory that the statute attempted to determine the conduct of the company in transmitting a message from one state to another by determining the consequences of not pursuing such conduct, and was an attempt to regulate interstate commerce.

It should not be doubted that all governmental agencies should be under Federal regulation with a uniform system, free from hostile state legislation; the Supreme Court, nearly forty years ago, said that it was the duty of congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed by state legislation. Chief Justice Waite, in the Postal Tel. Co. Case,[42] referring to the power and duty of congress, said:

"Both commerce and the postal service are placed within the power of congress, because, being national in their operation, they should be under the protecting hand of the national government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamship, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They are intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right but the duty of congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation. The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions."

In the celebrated case of Gibbons vs. Ogden,[43] decided in 1824, where Mr. Webster's speech paved the way for extended interstate commerce legislation, Chief Justice Marshall, adopting Mr. Webster's view and construing the word "commerce" as used in the Constitution, said: "Commerce undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term." That definition has remained unchanged, and following it, Chief Justice Waite, in the Pensacola Telegraph Company Case (supra), decided in 1877, said: "Since the case of Gibbons vs. Ogden, it has never

(38) 162 U. S. 650.
(39) 218 U. S. 406.
(40) 220 U. S. 364.
(41) 234 U. S. 542.
(42) 96 U. S. 1.

been doubted that commercial intercourse is an element of commerce which comes within the regulating power of congress."

Since the Pensacola Case, interstate messages have consistently been held to be interstate commerce, within the protection of the Federal Constitution, and not subject to legislative control of the states.[44]

The purpose of the adoption of the Interstate Commerce Clause in the Constitution was to make impossible the recurrence of varying state rules and regulations that had so annoyed the confederation and "to provide the necessary basis of national unity by insuring uniformity of regulation against conflicting and discriminating state legislation."[45] In the Croninger Case (supra), the Court referring to the Carmack Amendment said that "neither uniformity of obligation nor of liability was possible until congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia, in Southern R. Co. vs. Crowsbow,[46] where the Court said: 'Some states allow carriers to exempt themselves from all or a part of the common law liability by rule, regulation or contract, others do not. The Federal Courts sitting in the various states were following the local rule, a carrier being held liable in one Court, when under the same state of facts he would be exempt from liability in another.'" A similar state of affairs with reference to telegraph law confronted congress when the 1910 Amendment was adopted. When that condition is considered along with the importance of Federal control of governmental agencies, the public interest in uniform rules and regulations and nondiscriminating service and rates, and the broad scope of the amendment, we feel that when the Supreme Court of the United States decides the question they must hold that congress has taken possession of this field of legislation and that interstate communication by telegraph is no longer subject to varying state policies, statutes and decisions.

W. M. WILLIAMS.

Montgomery, Ala.

(43) 9 Wheat. 1.

(44) Western Union Tel. Co. v. Texas, 105 U. S. 650; Western Union Tel. Co. v. Pendleton, 122 U. S. 343; Western Union Tel. Co. v. Mass., 125 U. S. 530; LeLoup v. Port of Mobile, 127 U. S. 650; Western Union Tel. Co. v. Seay, 132 U. S. 472; Williams v. City of Talladega, 226 U. S. 404.

(45) Houston & Tex. Ry. v. U. S., 234 U. S. 342; Gibbons v. Ogden, 9 Wheat. 1.

(46) 5th Ga. App. 675.

[The principle urged in the foregoing paper was decided recently by the Supreme Court of the United States in Postal Telegraph Company v. Warren-Godwin Lumber Company (251 U. S. 27). The head-note of the decision is as follows:

"Under the Act of June 18, 1910, c. 309, 36 Stat. 539, 545, a telegraph company providing one rate for unrepeated interstate messages, and another, higher rate for those repeated, may stipulate for a reasonable limitation of its responsibility when the lower rate is paid; and the validity of such contracts is not determinable by state laws. P. 30. 116 Mississippi 660, reversed." —EDITOR.]

NEGLIGENCE—PROXIMATE CAUSE

POTORIK v. STATE.

Court of Claims of New York, March 8, 1920.

181 N. Y. Supp. 181.

Where a claim is made that the disease which a person contracts after an injury is the result of negligence, the facts establishing such claim cannot be left to conjecture, guess, or speculation; but there must be some evidence connecting the disease with the injury.

MORSCHAUSER, J. The above-named claimant filed a claim and a notice of intention, the claim being filed June 11, 1919, and the notice of intention August 20, 1918, alleging that through the negligence of the state, caused by the overflow of the Mohawk river and its tributaries, which occurred on February 20 and 21, 1918, the premises wherein the parents of the said Florence Potorik resided, No. 18 North street, in the city and county of Schenectady, was flooded, and that by reason thereof an infant, the claimant's intestate, being a little girl of about five months of age, became sick and died, alleging the cause of death to be lobar pneumonia. The evidence produced upon the

trial established the fact that the flood occurred through the negligence of the state arising out of the construction and maintenance of the Barge Canal, that the cellar of the dwelling of the parents of the deceased was flooded and the first floor was covered with water about 10 inches above the floor, that the water receded from the first floor of the dwelling shortly after it occurred, and that the parents of the claimant's intestate and the intestate moved from the first floor to the second floor of the dwelling. The claimant's intestate was a little girl about 5 months of age. About 2 weeks after the flood in March, 1918, the child became ill, and a physician was called, who found her suffering from bronchitis. Later, about April, a physician was called again, and the child was then found to be suffering from pneumonia. The child died, afflicted with lobar pneumonia, April 5, 1918. The claimant now makes a claim alleging that the death of the child was caused by the flood, and filed a claim of $5,000 damages against the state.

While it is a well-settled rule of law that a wrongdoer is responsible for the natural and proximate consequence of his misconduct and also such as might reasonably be supposed to have been apprehended, a wrongdoer is not liable for a remote cause, and he is only liable when the injury resulting follows in direct sequence, without the intervention of a voluntary independent cause.

In the matter of Hoey v. Metropolitan Street Railway Co., 70 App. Div. 60, 74 N. Y. Supp. 1113, it was held that where the plaintiff's intestate was injured by the negligence of the defendant, and he thereafter developed a progressive muscular atrophy, but that the immediate cause of death was acute pulmonary tuberculosis, a germ disease, in no way connected with the accident, nor shown to have resulted from the progressive muscular atrophy, a finding that the acute pulmonary tuberculosis resulted in connection will not be sustained, upon the theory unsupported by any evidence, that the intestate was so weakened by his injuries that the progressive muscular atrophy resulting therefrom made him susceptible to tuberculosis, and that by reason thereof he contracted the latter disease.

In the matter of Sallie v. New York City Railway Co., 110 App. Div. 665, 97 N. Y. Supp. 491, it was held that where the plaintiff's intestate, who was in previous good health, was injured by the sudden starting of a car, was rendered unconscious by the fall, had a rib fractured, and received other injuries from which he grew weaker daily, until at the end of the second week pleurisy set in, followed by tuberculosis, from which the intestate died within 9 weeks from the injury, and there is expert testimony that these ailments followed as a natural consequence of the injury, it was for the jury to say whether the death resulted from the injury, and it was further held that, though a germ causing a disease like tuberculosis must enter through the mouth, that fact will not bar a recovery, if such germ would not have developed, but for a weakened condition resulting from an injury caused by the wrongful act of the defendant.

Similar decisions, holding substantially that where an injury is received through the negligence of another, and the injury so debilitated the injured person that he became afflicted with a germ disease, the defendant would be liable: Hurley v. New York & Brooklyn Brewing Co., 13 App. Div. 167, 43 N. Y. Supp. 259; Purcell v. Lauer, 14 App. Div. 33, 43 N. Y. Supp. 988; Wood v. New. York Central & H. R. R. R. Co., 83 App. Div. 604, 82 N. Y. Supp. 160; affirmed 179 N. Y. 557, 71 N. E. 1142.

In all of these cases the person injured was injured by a blow or direct injury to the person, and evidence was given to show that the result of such injury so weakened such person that a germ disease developed as a natural sequence of the injury. Where a claim is made that the disease which a person contracts after an injury is the result of negligence, the facts establishing such a claim cannot be left to conjecture, guess, or speculation. There must be some evidence connecting the disease with the injury.

In the case on trial there was no evidence which would justify the finding that the infant contracted bronchitis by reason of any condition of the premises flooded by the state. There was some evidence showing that the bronchitis so debilitated the child that in its weakened condition it contracted pneumonia from a pneumonia germ; but there is no evidence in the case which would justify the court in finding that the pneumonia which the child contracted was the direct result of the flooding of its parents' premises. The evidence falls far short of connecting the illness of the child, having bronchitis, with the flooding upon the premises of its parents. There are many conditions, especially in this climate, in the

months of January, February, and March, that may produce and do produce bronchial trouble, pneumonia, and other similar diseases, and they are found amongst various classes of people and under various conditions, and we cannot say from the evidence that the flooding of this dwelling was the cause of the child's illness, and there is no direct evidence to justify such a finding, and no evidence from which an inference can reasonably be drawn to establish the fact the bronchitis from which the child was suffering was in any way attributable to the flood.

The case at bar is somewhat similar in principle to the case recently decided by the Court of Appeals in the matter of Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 126 N. E. 254.

The claim should therefore be dismissed.

ACKERSON, J., concurs.

NOTE—*Proximate Cause in Malicious Tort.*—It has been thought that the rule of proximate cause of injury resulting from a merely negligent act covers a much wider field where the act is willful or malicious. Thus in Isham v. Davis, 70 Vt. 588, 45 L. R. A. 87, it was ruled that where one unlawfully and maliciously shot and wounded a dog lying near the owner's house, and the dog rushed into the house and threw down the owner's wife, the person so shooting was liable for the injury resulting.

It was claimed by defendant that he did not owe to the wife any legal duty and his act was not the proximate cause of injury to her, but the Court said: "In these circumstances the law treats the act of defendant as the proximate cause of the injury, whether that was or could have been foreseen or not, or was or was not the probable consequence of the act. * * * The true principle is said to be that he who does such an act is liable for all the consequences, however remote, because the act is quasi criminal in its character, and the law conclusively presumes that all the consequences were foreseen and intended."

In Weick v. Lauder, 75 Ill. 93, it was ruled that the doer of an act unlawful in itself will be held responsible though other causes subsequently arise and contribute to produce the injury. In the course of the opinion the celebrated squib case was referred to, and Greenland v. Chaplin, 5 Exch. 343, where it was said by the Court, "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury shall be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first."

Where a conductor compelled a boy to give up his seat to another and he is pushed out by other passengers on a street car to the front platform, and there knocked off by a passenger and run over by the car, the proximate cause so far as the company was concerned was the act of the conductor. Sheridan v. B. C. & N. R. Co., 36 N. Y. 39, 93 Am. Dec. 490.

So where an insured is struck on the head by a husband defending his wife and his death resulted, his death is attributable to his act in violation of law. Bloom v. Ins. Co., 97 Ind. 478, 49 Am. Rep. 469.

Where one willfully turns a hose on a team of horses and they break loose and run against a third person, he is liable to the latter. Forney v. Goldmacher, 75 Mo. 113, 42 Am. Rep. 388.

Where a train has run over a fire hose and water is cut off from a burning building and the fire gains headway so that the building is destroyed, the railroad is liable for its value. M. C. Casting Co. v. R. Co., 109 Mass. 277, 12 Am. Rep. 689.

A case greatly resembling the squib case backward was that of Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267, where injury was suffered by one caught by the arm and swung around violently and then let go. By the impetus he was thrown against a hook and injured. There was liability.

Where one dug into a bank near a dam and thereby undermined some trees and a flood about three weeks later carried away the soil of the owner, it was held that this act of a trespasser caused the water to break through. Dickinson v. Boyle, 17 Pick. (Mass.) 78, 28 Am. Dec. 281.

But some of the courts have placed a limit on the rule, saying that even in willful and malicious torts, liability is limited to probable consequences or those which might have been foreseen. See Drake v. Kieley, 93 Pa. 495; Renner v. Canfield, 36 Minn. 90. Thus take the last cited case, which shows the shooting of a dog about 175 feet from his owner's residence, while his wife was outside, but not seen by the shooter. She was so frightened that her health was seriously affected. It was thought liability could not be predicated on the mere fact that the shooting was unlawful. This seems opposed to Isham v. Dow supra. C.

HUMOR OF THE LAW.

"Of course, you have made some mistakes in your career."

"I decline to admit it," replied Senator Sorghum. "I have a large corps of stenographers, clerks and political lieutenants whose chief business it is to assume responsibility for any mistakes."—*Washington Star.*

Nute Killens came into town to consult Gen. J. W. Lewis of Paris, Tenn., and asked him, "If your wife was to throw a shovel full of hot embers in your face, what would you do?"

Mr. Lewis told him, "Well, I don't know, Nute. But I expect I'd knock hell out of her."

"Well, Mr. Lewis, that's just what I done."—*Lawyer and Banker.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bail**—Appeal and Error.—Appeal will be dismissed, the recognizance for appeal not showing the punishment fixed.—Willoughby v. State, Tex., 219 S. W. 468.

2. **Bankruptcy** — Cross-Examination. — Under Bankruptcy Act, § 7, cl. 9 (Comp. St. § 9591), providing for an examination of the bankrupt, which shall not be offered in evidence against him in a criminal proceeding, etc., an accused, on trial for defrauding a national bank, is not subject to be cross-examined regarding his testimony on his bankruptcy examination.—Bain v. U. S., U. S. C. C. A., 262 Fed. 664.

3.——Estoppel.—A bank, which as pledgee wrongfully sold property of bankrupts at private sale for the amount of its lien, but afterwards received the profit from resales by the purchaser, which it held as its own, held estopped, on an accounting to the trustee, to apply such sum on unsecured indebtedness of bankrupts.—Howard v. Mechanics' Bank, U. S. D. C., 262 Fed. 699.

4.——Jurisdiction.—An order of a referee, requiring a holder of notes and accounts receivable of a bankrupt to turn the same over to the trustee for collection, transferring the claim of the holder to a lien to the proceeds, and expressly reserving the right to afterwards pass on the validity of the claim, the holder being present by attorney and assenting, held to give the bankruptcy court jurisdiction over the claimant to adjudicate its claim.—Commercial Security Co. v. Holcombe, U. S. C. C. A., 262 Fed. 657.

5. **Banks and Banking**—Trust Fund.—Bank not liable for payment of check without knowledge that deposit is trust fund.—Davis v. Indiana Nat. Bank, Ind., 126 N. E. 489.

6.——Set-Off.—A bank is entitled to set-off against a deposit account, the amount of a due note held by it against the depositor; but it is not obligated so to do, under the penalty of having the note considered as paid in favor of the depositor maker.—Bank of California v. Starrett, Wash., 188 Pac. 410.

7. **Bills and Notes**—Indorsement.—Whether an indorser who after discharge for failure to give him notice of dishonor makes a new promise to pay knew of the failure to present the note is immaterial, as a new promise with knowledge of the fact that no notice of dishonor was given sufficiently manifests the intent to relinquish a known right which makes the waiver complete.—Hurlburt v. Bradley, Conn., 109 Atl. 171.

8. **Burglary**—Force.—The use of keys to enter a building is the use of sufficient force as applied to it to constitute burglary.—Rippey v. State, Texas, 219 S. W. 463.

9. **Carriers of Goods**—Bill of Lading.—An instrument issued by carrier to consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to destination, is a "bill of lading."—Aman v. Dover & Southbound R. Co., N. C., 102 S. E. 392.

10.——Consignor.—Where a bank acquires title to a draft with bill of lading attached by crediting the amount to consignor's account, and the consignee pays the draft, being compelled to do so before receiving the bill of lading by the United States Food Administration, and the shipment is not as guaranteed, and a judgment is obtained against the consignor, the consignee cannot recover the amount of damages due him in a garnishment against the bank.—F. A. Kadane & Co. v. Security Nat. Bank, Tex., 219 S. W. 506.

11.——Damages.—The general rule is that the measure of damages for unreasonable delay in the delivery of goods shipped is the difference between their market value when they should have been delivered and the market value when they were delivered, with interest from the former date, less the freight, if unpaid, and in the absence of a special contract that measure of damages for delay is exclusive.—Southern Ry. Co. v. Bunch, Ga., 102 S. E. 462.

12. **Carriers of Passengers** — Baggage.—The carrier's baggage service is only for the convenience of the passenger, and, except in rare cases, is limited to his own personal effects, and does not include those carried by him as a favor to another.—Schuster v. Norfolk & W. Ry. Co., W. Va., 102 S. E. 476.

13.——Pass.—A railroad company was liable for an injury sustained by an employe traveling on a pass through its willful or wanton negligence, though the pass contained a release of liability for injuries.—New York Cent. R. Co. v. Mohney, U. S. S. C., 40 Sup. Ct. 287.

14. **Champerty and Maintenance**—Assignment.—Assignment of cause of action for enticement

of wife is void.—Gerdink v. Meginnis, Ind., 126 N. E. 499.

15. **Chattel Mortgages**—Lien.—If the debt for which a chattel mortgage was given to secure is paid, the mortgage necessarily ceases to be a lien upon the property. — Persinger Garage Co. v. Caminsky, Iowa, 176 N. W. 794.

16. **Commerce**—Employe.—The Federal Employers' Liability Act, April 22, 1908 (Comp. St. §§ 8657-8665), applies only when both employer and employe are engaged in interstate commerce.—Saxton v. El Paso & S. W. R. Co., Ariz., 188 Pac. 257.

17.——Income Tax.—The Oklahoma Income Tax Law does not constitute a burden on interstate commerce, as applied to a non-resident deriving an income from the operation of oil and gas properties, the products of which are shipped in interstate commerce.—Shaffer v. Carter, U. S. S. C., 40 Sup. Ct. 221.

18.——Indirect Influence.—While a state may not directly regulate or burden interstate commerce, until Congress acts under its superior authority, it may protect or regulate matters of local interest, though indirectly affecting such commerce.—Pennsylvania Gas Co. v. Public Service Commission, Second Dist., of State of New York, U. S. S. C., 40 Sup. Ct. 279.

19. **Constitutional Law**—Due Process of Law. —A provision of a charter making water charges a lien on the property to which the water is furnished, though the meters were installed at the request of a tenant, does not deprive the property owner of property without due process of law in violation of Const. U. S. Amend. 14, § 1.—Dunbar v. City of New York, U. S. S. C., 40 Sup. Ct. 250.

20.——Free Speech.—Free speech is not an absolute right under the Constitution.—Schaefer v. U. S., U. S. S. C., 40 Sup. Ct. 259.

21.——Income Tax.—A discrimination by a state against citizens of adjoining states in imposing an income tax would not be cured, if those states established like discriminations against the citizens of the state in question.—Travis v. Yale & Towne Mfg. Co., U. S. S. C., 40 Sup. Ct. 228.

22. **Contracts**—Implied.—Generally when necessities are supplied to a person who by reason of disability cannot himself make a contract, the law implies an obligation on the part of such persons to pay for such necessities out of his own property.—Snyder v. Nixon, Iowa, 176 N. W. 808.

23.——Public Policy.—"Public policy" is that principle of law which holds that no citizen can lawfully do that which has tendency to be injurious to the public or against public good, and is declared by the Constitution and statutes and decisions of the courts.—Spaulding v. Maillet, Mont., 188 Pac. 377.

24.——Rescission.—To rescind a contract for intoxication of the maker, the evidence must disclose that he was so intoxicated at the time, so as to be entirely incapable of understanding the nature and effect of the transaction.—Renfeldt v. Brush-McWilliams Co., N. D., 176 N. W. 838.

25.——Rescission.—To justify the rescission of a contract because of falsehood, the falsehood must have been relied upon by the complaining party to his detriment.—Lakeside Forge Co. v. Freedom Oil Works Co., Pa., 109 Atl. 216.

26. **Corporations** — Estoppel. — Corporation, having accepted the benefits of contract entered into by its secretary and general manager, cannot avoid the contract upon the ground that secretary and general manager had no authority to enter into such contract.—Morris v. Basnight, N. C., 102 S. E. 389.

27.——Preference.—The president of an insolvent corporation who advanced money to pay its debts cannot prefer himself as a creditor and have transferred to him corporate property in payment of the advancements, even with the formal consent and official action of other corporate officers.—Armstrong v. Ellerslie Planting Co., La., 83 So. 830.

28. **Covenants**—Breach.—The burden is on grantee to prove the value of the portion of the tract conveyed, title to which had failed, before he can recover damages for breach of covenant; there being no presumption that the entire tract is of uniform value per acre.—Lane v. Stitt, Ark., 219 S. W. 340.

29.——Building Restrictions.—An apartment is a "residence," within the meaning of a building restriction providing that certain lots should be used for residence purposes only.—Struck v. Kohler, Ky., 219 S. W. 435.

30. **Criminal Law**—Accomplice.—Slight evidence corroborating the accomplice testimony may be sufficient to authorize the jury to convict.—Thompson v. State, Ga., 102 S. E. 453.

31.——Argument of Counsel.—It is improper for counsel for the state in a criminal trial to state to the jury his belief that defendant is guilty.—Johnson v. State, Ga., 102 S. E. 439.

32.——Character.—In criminal prosecution, where defendant did not put in issue his character and reputation, the state cannot draw such matters in issue.—Wagner v. State, Texas, 219 S. W. 471.

33.——Confession.—Confessions of an accused to a deputy sheriff and jailer were not rendered incompetent by reason of the failure of such officers to caution the prisoner that his statements might be used against him, in the absence of a statute requiring such caution or warning. —Carothers v. State, Miss., 83 So. 809.

34.——Evidence.—Mere corruptive or compromising efforts, words, or acts of friends or relatives, attempted in behalf of accused, whose own connection therewith does not appear, are not admissible against him.—Nader v. State, Texas, 219 S. W. 474.

35.——Sentence.—If there has been a lawful verdict of conviction rendered in a criminal case, an error of the judge in imposition of the sentence is no sufficient reason for setting aside the verdict and trying the accused again upon the question of his guilt or innocence.—Davis v. Town of Gibson, Ga., 102 S. E. 466.

36. **Damages**—Measure of.—The true measure of damages for the burning of grass is its reasonable market value at time of its destruction, but, if the grass has no market value at that point, the owner's measure of recovery would be the reasonable value of the grass to him, considering the use to which he was putting it. —Gulf, C. & S. F. Ry. Co. v. Price, Texas, 219 S. W. 518.

37.——Punitive.—Before the question of punitive damages for injury to land can be submitted to the jury, there must be evidence that the act complained of was committed willfully or maliciously or under circumstances of violence or reckless indifference to the rights of others. —Hoffman v. Berwind-White Coal Mining Co., Pa., 109 Atl. 234.

38.——Remoteness.—Where a magazine initiated a circulation contest, offering valuable prizes in various districts for the higher number of votes secured by means of subscriptions procured by contestants, damages to a bona fide contestant from discontinuance of the contest in her district were not too remote to permit recovery by her for the breach of contract.—Wachtel v. National Alfalfa Journal Co., Iowa, 176 N. W. 801.

39.——Special.—Special damage is that which the law does not necessarily imply from the acts complained of.—Ralph N. Blakeslee Co. v. Rigo, Conn., 109 Atl. 173.

40. **Death**—Damages.—There is no exact standard by which damages for a child's death can be measured, and much is left to the fair and intelligent judgment of the jury.—Hughey v. Lennox, Ark., 219 S. W. 323.

41. **Deeds**—Condition Subsequent.—A reservation in a father's voluntary conveyance to his son of a right to revoke the deed if his son should become a drunkard, or cruel or abusive to parents, or hopelessly involved in debt, violates no principle of public policy and is valid; and on a breach of any of the conditions the grantor may terminate the estate.—Stewart v. Workman, W. Va., 102 S. E. 474.

42.——Delivery.—It is a legal prerequisite that the delivery of a deed must be accompanied with the intent that it shall become operative as such.—Shannon v. Aagaard, Cal., 188 Pac. 317.

43.——Merger.—Insofar as a deed varies from a prior executory contract pursuant to which it is executed, such departure is presumed to represent a change mutually agreed upon, and merges all antecedent agreements, negotiations, and conversations, and is conclusive, in the absence of a showing that the variance is due to fraud or mutual mistake.—Watson-Loy Coal Co. v. Monroe Coal Mining Co., W. Va., 102 S. E. 485.

44. **Ejectment**—Possession as Notice.—Where from long possession the presumption of a grant to complainants in ejectment arises, it is not necessary that they show title by paper writings.—Keel v. Sutton, Tenn., 219 S. W. 351.

45. **Eminent Domain**—Special Benefits.—While Legislature, in providing for the assessment of damages in eminent domain cases, may authorize the deduction of general as well as special benefits, yet, unless the statute so provides, only special benefits will be deducted.—Elks v. Board of Com'rs of Pitt County, N. C., 102 S. E. 414.

46. **Evidence**—Expert Testimony.—Cattlemen of many years' experience in buying and selling grass and grass land were qualified to testify as to the damage done to a pasture and grass by a fire.—Wichita Valley Ry. Co. v. Martin & Walker, Texas, 219 S. W. 559.

47.——Receipt.—An acknowledgment in a deed of the receipt of the consideration is only prima facie evidence of payment which may be rebutted by proof aliunde.—Saylor's Adm'r v. Brock, Ky., 219 S. W. 441.

48. **Executors and Administrators**—Discretion.—An executor may, in the exercise of a reasonable discretion, the creditor consenting, postpone payment of testator's negotiable note and renew such note to afford opportunity to pay it out of the assets of the estate.—First Nat. Bank of Salem v. Jacobs, W. Va., 102 S. E. 491.

49.——Dormant Judgment.—Where an administrator in his representative capacity obtained a judgment against several defendants, the right to revive judgment after it became dormant was in the administrator, and not in the heirs at law.—Armstrong v. Harper, Ga., 102 S. E. 463.

50. **Frauds, Statute of**—Oral Promise.—If an oral promise to pay for goods furnished another creates an original liability on the part of the promisor, and credit is extended solely to him, it does not fall within the statute of frauds.—Byrd v. Woods, Okla., 188 Pac. 337.

51. **Fraudulent Conveyances**—Good Faith.—A valuable consideration paid by a child for a transfer of land from a parent, who was in debt, is not sufficient, as in addition thereto it must appear that the purchase was in good faith and without any intent on the part of the purchaser to hinder, delay or defraud the parents' creditors.—Chapman v. Critzer, Wash., 188 Pac. 412.

52.——Husband and Wife.—Transactions between husband and wife to the prejudice of creditors are to be closely scanned by a jury on the trial of an issue between creditors in whose favor an execution has been levied upon property, as the property of the husband and the wife, who claims the property.—Garner v. State Banking Co., Ga., 102 S. E. 442.

53. **Gifts**—Intention.—Intention of donor is important in determining whether a delivery is irrevocable.—Hayes v. McKinney, Ind., 126 N. E. 497.

54. **Homicide**—Deadly Weapon.—Where the killing by accused with a deadly weapon is proved or admitted, the burden shifts to defendant to show mitigation to the satisfaction of the jury.—State v. Bailey, N. C., 102 S. E. 406.

55.——Immediate Punishment.—Under the statute authorizing a school teacher to punish his pupils moderately, if the punishment passes beyond that point, and is immoderate, or for the purpose of revenge, or maliciously done, the right does not exist, and the right of self-defense in the pupil obtains.—Dill v. State, Texas, 219 S. W. 481.

56.——Insults.—It is not every act or insulting word of a defendant that makes him an aggressor; the question depending on the character of the act and intentions of the defendant.—State v. Coll, La., 83 So. 844.

57. **Husband and Wife**—Coverture.—A husband may transfer his personal property in payment of his debts regardless of coverture.—Duncan v. Duncan, Pa., 109 Atl. 222.

58.——Separate Property.—Where a husband conveyed an interest in a mining claim to his wife, but the consideration was not paid out of her separate property, the conveyance was not intended as a gift, and she never listed the property as her separate property, it was community property.—Cole v. Ralph, U. S. S. C., 40 Sup. Ct. 321.

59. **Indemnity**—Liability.—Agreement by a corporation, which acquired the business of an individual, to assume and pay all obligations of the seller "contracted in said business, now due or to become due," held a contract to pay the debts, and not one to indemnify the seller.—In re H. L. Herbert & Co., U. S. C. C. A., 262 Fed. 682.

60. **Insurance**—Application for.—In the absence of statute to the contrary, false representations in an application for insurance which the applicant warrants to be true will avoid the policy without reference to the materiality of such statements.—Modern Woodmen of America v. Atcheson, Texas, 219 S. W. 537.

61.——Oral Contract.—An oral contract of insurance, which contains all the elements essential to a contract, is valid in Kentucky; such contracts being valid in the absence of a statute to the contrary.—Georgia Casualty Co. v. Bond-Foley Lumber Co., Ky., 219 S. W. 442.

62.——Subrogation.—Where a third person causes a loss, a fire insurance company is, under the principles of equity, entitled to subrogation to the rights of the insured against such third person to the extent that it has paid the loss.—Lumbermen's Mut. Ins. Co. v. Southern Ry. Co., N. C., 102 S. E. 417.

63. **Joint Adventures**—Fiduciary Relation.—Where one buys a piece of property on his own account and thereafter sells an interest in it to different persons pursuant to a plan to form an association to handle it, he occupies no fiduciary relation to prospective purchasers, and need not inform them what property cost him, or refrain from charging them more than a proportionate part of what he had paid for it.—Withroder v. Elmore, Kan., 188 Pac. 428.

64. **Landlord and Tenant**—Eviction.—In suit for damages from an unlawful and forcible eviction of plaintiff tenants from defendant lessor's land, proof of the expense incurred by plaintiffs was admissible on the issue of malice and consequent exemplary damages; proof of expense always being admitted on such grounds.—Evans v. Caldwell, Texas, 219 S. W. 512.

65. **Larceny**—Presumption.—If automobile stolen was in the possession of defendant, defendant is presumed to be the thief, and the burden is on him to rebut or overcome such presumption.—State v. Weiss, Mo., 219 S. W. 368.

66.——Recent Possession.—To constitute legal possession of stolen property, so as to give rise to an inference of guilt, the property need not

be in the hands, house or premises of the alleged possessor, who may have the same secreted on another person's premises, or out on the commons, and nevertheless be in actual care, control and management, in which case he is legal possessor.—Marable v. State, Tex., 219 S. W. 455.

67. **Master and Servant**—Assumption of Risk.—Under the federal Employers' Liability Act, it is not true, without qualification, that a servant does not assume a risk created by the master's negligence.—Chicago, R. I. & P. Ry. Co. v. Ward, U. S. S. C., 40 Sup. Ct. 275.

68.——Inexperience.—The obligation to instruct an employe before putting him to work as to any of his duties which are dangerous does not necessarily follow as a matter of law from his minority when employed, his inexperience, or the fact that the service is dangerous, and that his inexperience is known to the employer.—Bibb Mfg. Co. v. Thornton, Ga., 102 S. E. 465.

69.——Master's Direction.—If an employe doing work in a safe way is ordered to do it in an unsafe way with a threat of discharge if he refuses, and by reason of the order he enters upon the work and is injured without his fault, he can recover damages.—Jones v. D. L. Taylor & Co., N. C., 102 S. E. 397.

70.——Specific Negligence.—A servant suing for injuries must show not only that he has sustained injury, but also some specific act of negligence on the part of the master; the burden to prove the connection between the injury and the negligence being on the servant.—Staley v. Wehmeier, Ky., 219 S. W. 408.

71.——Wrongful Discharge.—Where defendants employed plaintiff for a year and he rendered services until the business was sold to a corporation, which defendants organized, the mere fact that he worked for the corporation when defendants ceased to have work for him to do did not terminate the contract as a matter of law so as to defeat recovery for discharge; and, there being evidence that he had an understanding with defendants that work for the corporation should not affect his rights under the contract, it was error to direct a verdict for defendants.—Bennett v. Brown, N. H., 109 Atl. 201.

72. **Mines and Minerals**—Abandonment.—A lessee's unexplained cessation of operation under an oil and gas lease may give rise to fair presumption of abandonment, and it may be that, standing alone, a court as a matter of law may declare the lease abandoned.—Strange v. Hicks, Okla., 188 Pac. 347.

73.——Location.—"Location" is the act or series of acts whereby the boundaries of a claim are marked, etc.—Cole v. Ralph, U. S. S. C., 40 Sup. Ct. 321.

74.——Rescission.—Where plaintiff did not read an oil lease, but was not prevented from so doing by any trick or device on the part of the defendant, plaintiff cannot obtain rescission of the lease on the ground that it was not as advantageous as he expected it to be.—Texas Co. v. Keeter, Tex., 219 S. W. 521.

75. **Negligence**—Attractive Nuisance.—An owner of premises who maintains thereon objects calculated to attract children onto the premises for play must exercise due care to protect the children from injury therefrom.—Morrison v. Phelps Stone Co., Mo., 219 S. W. 393.

76. **Partnership**—Action Against.—Where a creditor obtained a judgment against a partnership and against each partner individually, and another creditor obtained judgment against one of such partners, the holder of the senior judgment could not be required to proceed against that partner against whom he alone had a judgment where the fund in court would thereby be awarded to the junior judgment.—Love v. Goodson, Ga., 102 S. E. 429.

77.——Termination.—Where a special partnership has terminated, and one of the partners sues another concerning a matter independent of the partnership, the defendant may counterclaim for items due him out of the partnership transactions where they are few and simple, and there is no occasion for an equitable accounting.—Zimmerman v. Lehr, N. D., 176 N. W. 837.

78. **Patents**—New Use.—Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention.—In re Smith, D. C., 262 Fed. 717.

79. **Pdincipal and Agent**—Accepting Benefits.—A principal cannot accept the benefits of his agent's acts and escape liability thereon.—Gardner v. City of Glendale, Cal., 188 Pac. 307.

80.——Exclusive Agency.—For breach of exclusive agency contract, measure of damages is not gross profits of dealer.—Orester v. Dayton Rubber Mfg. Co., N. Y., 126 N. E. 510.

81. **Sales**—Conditional Sale.—A seller of a sprinkler system to the owner of a building on conditional sale was not estopped to replevin the system from a lessee by reason of the fact that the tenant had bought and paid for an air compressor and other things which were attached to the system.—Automatic Sprinkler Co. of America v. Central Amusement Co., Iowa, 176 N. W. 786.

82.——Implied Warranty.—In the sale of manufactured goods, where there is no opportunity for inspection by the purchaser, there is an implied warranty that the articles are merchantable.—Neal v. West Winfree Tobacco Co., Ark., 219 S. W. 326.

83.——Inspection.—Where a written contract for the sale of lumber provides for "final inspection to be made at the seller's mill," such inspection is not necessarily precedent to the existence of a binding contract, but is a condition precedent merely to the passing of title to the subject-matter.—G. Elias & Bro. v. Boone Timber Co., W. Va., 102 S. E. 488.

84.——Remedies of Seller.—The buyer has various remedies for relief from contracts induced by fraud, among which is the right to confirm the contract after knowledge of the fraud, and reconvene for damages when sued upon the contract.—Alba-Malakoff Lignite Co. v. Hercules Powder Co., Texas, 219 S. W. 554.

85.——Reserving Title.—A sale contract, reserving title in the seller until all payments have been made, irrespective of an express provision to that effect, authorizes the seller to retake possession of the property on breach of the conditions without returning the payments already made.—Los Angeles Furniture Co. v. Hansen, Cal., 188 Pac. 292.

86. **Taxation**—Double Taxation.—Const. U. S. Amend. 14, does not forbid double taxation short of confiscation or proceedings unconstitutional on other grounds.—Ft. Smith Lumber Co. v. State of Arkansas ex rel Arbuckle, U. S. S. C., 40 Sup. Ct. 304.

87. **Vendor and Purchaser**—Vendor's Lien.—The vendor's lien securing a negotiable purchase-money note, like a mortgage, is incidental to the note and accompanies it in all transfers.—Pope v. Beauchamp, Texas, 219 S. W. 447.

88. **Wills**—Contingent Interest.—Where land was conveyed in trust for the exclusive benefit of a married woman for life, with directions that the land should go to the husband in event she died without issue, the husband took a contingent interest which would pass by devise.—Hollowell v. Manley, N. C., 102 S. E. 386.

89.——Construction.—The language of a will subjected to construction must reasonably be capable of more than one interpretation.—Mosle v. Goodrich, Conn., 109 Atl. 166.

90.——Construction.—The word "lend" used in a will passes the property to which it applies in the same manner as if the word "give" or "devise" had been used, in the absence of anything in the will having a tendency to show that it was not used in that sense.—Jarman v. Day, N. C., 102 S. E. 402.

91.——Mental Capacity.—The making of a will does not require so high a degree of mental capacity as the making of deeds or contracts.—Huffnagle v. Pauley, Mo., 219 S. W. 373.

92.——Undue Influence.—Threats of testator's daughter to have him prosecuted and her misconduct coming to his knowledge from third persons, by reason of which he gave his property to others, when otherwise he would have given it to her, is not undue influence.—Stutiville's Ex'rs v. Wheeler, Ky., 219 S. W. 411.